115-321

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 498.

THE LOUISVILLE AND NASHVILLE RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF KENTUCKY.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

FILED FEBRUARY 18, 1884.

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

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1 To the Honorable T. F. Hargis, chief justice of the court of appeals of the Commonwealth of Kentucky:

The Louisville and Nashville Railroad Company respectfully petitions and shows as follows:

That your petitioner is a duly incorporated company, organized under the laws of said Commonwealth, and owns and operates several lines of railroad in that State, comprised in one system and known as the Louisville and Nashville railway system.

That heretofore a suit was commenced in the circuit court of Franklin county, Kentucky, by the Commonwealth of Kentucky as plaintiff against your petitioner as defendant to recover from petitioner the sum of about $16,004.32, alleged to be due said Commonwealth as and for account of taxes for the year 1882, claimed to have been assessed for that year against your petitioner's line of railroad within its borders by the board of railroad commissioners of that Commonwealth.

That said suit was taken by appeal to the court of appeals of Kentucky, which is the highest court of that State in which a decision in the suit could be had, and in that court a judgment was rendered on the 18th day of December, 1883, against your petitioner for the amount of the said Commonwealth's claim, to wit, the sum of $16,004.35 and costs. Said judgment is final and no appeal lies therefrom.

2 That a full transcript of the record in said suit is herewith presented and the same is made a part of this petition, being duly authenticated.

That as appears from said record of said suit your petitioner therein denied the validity of certain statutes of said Commonwealth of Kentucky upon which the plaintiff in said suit based its right to recover, your petitioner pleading that said statutes were repugnant to the Constitution of the United States, and said decision and judgment of said court of appeals in said suit was in favor of their validity.

Said statutes of Kentucky are the act of 3rd April, 1873, entitled "An act to prescribe the mode of ascertaining the value of the property of railroad companies for taxation and for taxing same," and the act of 6th April, 1882, entitled "An act to prevent extortion and discrimination in the transportation of freights and passengers by railroad corporations, and in aid of that purpose to establish a board of railroad commissioners and define its duties and powers," and the act of 19th April, 1882, entitled "An act to amend an act to prescribe the mode of ascertaining the value of property of railroad companies for taxation and for taxing the same," approved April 3rd, 1883.

By virtue of which statutes said Commonwealth assumed to invest the board of railroad commissioners with absolute power to increase the value of the properties of railway companies for taxation arbitrarily and without notice or due process of law,

3 and from whose decision no appeal was allowed, when by the general statutes of that State the properties of all other per-

sons were protected from arbitrary assessments by enactments providing that notice should be given before even proof was heard tending to show that the value of same for taxation should be increased, as well as that every other person other than railroad corporations should have the right to an appeal on all matters touching the valuation and assessment of his property for taxation from the action of the assessor and the supervisors to the county court and to the circuit court, and when by the constitution of that State taxation under the authority thereof must be equal and uniform, and by the Constitution of the United States "No State shall make or enforce any law which should abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

All of which appears in full in the record and proceedings in said suit, as shown by the said transcript thereof, herewith exhibited; and in the said final decision thereof manifest error hath been done, to the great damage of your said petitioner.

Wherefore said company prays for the allowance of a writ of error, and such other process as may cause the same to be corrected by the Supreme Court of the United States.

W. LINDSEY,
For the L. & N. Railroad Co.

Allowed.
THOMAS F. HARGIS.

4 HOLMES CUMMINS & C. B. SIMRALL,
Att'y- for L. & N. R. R. Co.

Approved.
THOMAS F. HARGIS,
Chief Justice of Kentucky.

5 *Assignment of Errors.*

THE LOUISVILLE & NASHVILLE RAILROAD COMPANY
vs.
THE COMMONWEALTH OF KENTUCKY.

1. The court erred in sustaining the validity of the statute of the Commonwealth of Kentucky entitled An act to prescribe the mode of ascertaining the value of the property of railroad companies for taxation and for taxing the same, "approved April 3rd, 1878," when the same was repugnant to the Constitution of the United States.

2. The court erred in sustaining the validity of an act of the Commonwealth of Kentucky entitled An act to amend an act to prescribe the mode of ascertaining the value of railroad property for taxation and for taxing the same, "approved April 19th, 1882," because said act was repugnant to the Constitution of the United

6 States, in that said act attempted to confer powers in violation of the provisions of the Federal Constitution.

3. The court erred in sustaining said statutes, because no State

can make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws, when by said statutes plaintiff in error was deprived of its property without due process of law, and was denied the equal protection of the law guaranteed and granted to other citizens.

4. The court erred in affirming the judgment of the circuit court of Franklin county, Kentucky, in rendering judgment against
7 plaintiff in error.

HOLMES CUMMINS,
C. B. SIMRALL,
Att'ys for Pl'tff in Error.

8 Pleas before the Hon. Thomas F. Hargis, chief justice, and Hon. Thomas H. Hines, Hon. Wm. S. Prayor, and Hon. Joseph H. Lewis, associate judges of the court of appeals of Kentucky, at Frankfort, the capital of the State of Kentucky, on the 18th day of December, 1883.

Be it remembered that on the 2nd day of July, 1883, the appellant, The Louisville and Nashville Railroad Company, filed in the clerk's office of the court of appeals of Kentucky their transcript of record, as follows, viz:

Kentucky Franklin Circuit Court.

Proceedings before the Hon. P. U. Major, judge of the court aforesaid, at the court-house, in the city of Frankfort, on the 1st day of March, 1883.

9 Be it remembered that on the 25th day of January, 1883, the attorney general filed in the clerk's office aforesaid the following petition:

Petition.

Franklin Circuit Court.

THE COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
THE LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Plaintiff states that the defendant is a railroad corporation chartered by the laws of the State of Kentucky, and was, during the year 1882, and now is, the owner of and operating various lines of railroad lying in the State of Kentucky.

Plaintiff states that the defendant, for the purpose of assessment and taxation for the year 1882, as required by law, reported to the auditor of public accounts of the State of Kentucky the total length of the road or roads owned and operated by it within this State and the value thereof per mile, and also reported its engines and
10 cars and depot ground improvements and other real estate

and their value. The total valuation of said roads and property, as reported as aforesaid, was ——— dollars.

Plaintiff states that, after said report and valuation was made to the auditor of the State by defendant, the board of railroad commissioners, who, by law, constitute a board of equalization to value and assess the railroad property of the State, after being sworn as required by law, on the 1st day of September, 1882, met at the office of the auditor of public accounts, and, with a majority of said board present constituting a quorum, the auditor placed before them the valuation returns and reports made to him by defendant.

Plaintiff states that said board continued its sittings from day to day as provided by law, of which defendant had due notice; and plaintiff avers that defendant did appear before said board,
11 by its agents and attorneys, and presented such facts and figures, information and argument, in relation to the valuation and assessment of its said property, as it saw proper to.

Plaintiff states that said board of equalization, after a full consideration of said returns, reports, information, and arguments before them, valued and assessed for taxation for the year 1882 the defendant's lines of railroad lying in this State, the same reported by def't to the auditor of public accounts, together with engines, cars, depot grounds, improvements, and other real estate, at the sum of $15,521,406, and on the — day of ——, 1882, returned and filed with the auditor of public accounts of the State the record of said assessment and valuation, duly signed and attested as provided by law, a copy of which, marked (A), is herewith filed as a part hereof.

Plaintiff states that the auditor of public accounts, before the 10th day of October, 1882, duly notified defendant of the amount of *of* its assessment for taxation, and, as required by law, opened an account with defendant, charging it with the sum of $73,726$\frac{69}{100}$, the
12 amount of tax due the State upon said assessment and valuation, 47½ cents to the 100 dollars, which is the rate of taxation provided by law on all the real estate in the Commonwealth for the year 1882; a copy of said account is filed as part hereof, marked "B."

Plaintiff states that the defendant is indebted to her in the sum of $72,726$\frac{69}{100}$, taxes due as aforesaid, with interest from the 10th day of October, 1882, no part of which has been paid except the sum of $25,000, paid January 22nd, 1883. Wherefore plaintiff prays judgment for said debt and interest from October 10th, 1882, subject to said credit of $25,000, and for her costs and all proper relief.

P. W. HARDIN,
Att'y Gen'l.

Account Filed with Petition.

OFFICE AUDITOR OF PUBLIC ACCOUNTS.
FRANKFORT, KY., *January 23rd*, 1883.

Louisville & Nashville R. R. Co. & Branches, Dr.

1882.			
Oct. 10.	To State taxes for 1882 on $15,521,406, at 47½ cents on each $100 worth of property		$73,726 69
1883.			
Jan'y 26.	By check on account		25,000 00
13	Balance due		$48,726 69

As shown by the report of the railroad commissioners of Kentucky, a copy of which follows:

STATE OF KENTUCKY.

Louisville & Nashville R. R. Co. Main Stem.

139.69 mi. @ $35,000, including sidings and rolling stock	$4,889,150	
Other property	421,343	
		$5,310,493 00
Memphis Branch.		
45 mi. @ $20,000	$920,000	
Other property	4,405	
		924,405 00
Henderson Division.		
98.09 mi. @ $1,400, including sidings and rolling stock	$1,373,260	
Other property	22,230	
		1,395,490 00
Knoxville Branch.		
110.30 mi. @ $1,200	$1,323,600	
Other property	12,398	
		1,335,998 00
Cumberland & Ohio, Sou. Division.		
31.40 mi. @ $10,000	$314,000	
Other property	2,145	
		316,145 00
Cumberland and Ohio, Nor. Division.		
26.72 mi. @ $10,000	$267,200	
Other property	5,300	
		272,500 00
Richmond Branch.		
33.80 mi. @ $12,000	$405,600	
Other property	4,105	
		409,705 00

14

Bardstown Branch.		
17.30 mi. @ $10,000	$173,000	
Other property	1,000	
		$174,000 00
Railway Transfer Co.		
4.13 mi. @ $15,000	$61,950	
Other property	2,050	
		64,000 00
Lou, Harrod's Creek & West Port Div.		
11 mi. @ $3,000	$33,000	33,000 00
Short Line Division.		
108.96 mi. @ $30,000	$3,268,800	
Other property	19,090	
		3,287,890 00
Lexington Branch.		
65.92 mi. @ $30,000	$1,977,600	
Other property	20,180	
		1,997,780 00
Total		$15,521,406 00

I hereby certify that the foregoing account is correct as shown by the books on file in this office, and that the same has not been paid except the sum of twenty-five thousand dollars, which has been duly credited hereon.

FAYETTE HEWITT, *Auditor.*

Summons.

The Commonwealth of Kentucky to the sheriff of Franklin county, Greeting:

You are commanded to summons The Louisville and Nashvillle Railroad Company to answer on the first day of the next
15 February term of the Franklin circuit court, a petition filed against it in said court by the Commonwealth of Kentucky, and warn them that upon failure to answer the petition will be taken for confessed, or they will be proceeded against for contempt, and you will make due return of this summons on the first day of the next February term of said court.

Witness W. Franklin, clerk of said court, this 25th day of January, 1883.

W. FRANKLIN, *C. F. C. C.*,
By ROBERT FRANKLIN, *D. C.*

Executed on E. P. Bryant, agent for L. & N. R. R. Co., by delivering to him a copy of the within, Jan'y 25th, 1883.

J. W. GAINS, *S. F. C.*,
By W. HUGHES, *D. S.*

Order Filed. Ans.

At a court held on the 7th day of Feb'y, 1883, the defendant appeared and filed an answer.

Answer.

THE COMMONWEALTH OF KY., Plaintiff,
vs.
THE LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

16 Par. No. 1. The defendant, for answer herein, admits that it is a railroad corporation, chartered by the laws of the Commonwealth, and that in the month of July, 1882, did own and operate various lines of railway within this State, as set out in the plaintiff's petition. It admits it did in said year 1882 report to the auditor of public accounts the length of all its said roads, and their value per mile, as well as its engines, cars, depot grounds, improvements, and other real estate. It also reported that the aggregate value of its said property was $12,152,078.00.

Defendant denies, however, that the board of railroad commissioners did or could constitute a board of equalization to assess or to value its property for the purpose of taxation, or for any purpose, and it does not admit it had due notice of the sittings of the said pretended board of equalization, or that it appeared before said board, either by agent or by attorney, or presented it either facts, figures, or information in relation to the valuation or assess-
17 ment of its property, because said board had no authority to give due or other notice of its sittings and was not bound to hear arguments in defendant's behalf or to consider any facts, figures, or information defendant might have presented.

For further answer defendant says it is true it did, on the 22d day of January, 1883, pay to the Commonwealth on account of taxes for the year 1882 the sum of $25,000, and it avers that afterwards, to wit, on the 30th day of January, 1883, it also paid on the same account the further sum of $32,722.37, which two sums aggregate $57,722.37, or precisely 47½ cents on each $100 of the value of defendant's taxable property for 1882 as reported to the auditor of public accounts, as hereinbefore set out, to wit, 47½ cents on each one hundred dollars of $12,152,078.00 worth of property. But defendant says that before and at the time the first of said payments was made it notified the auditor of public accounts, in writ-
18 ing, that the same was made with the express intention, reservation, and understanding on its part that the payment should not be taken or construed as an acquiescence in or admission of the legality or validity of the assessments or the valuations made by the board of railroad commissioners or of the taxes claimed by the Commonwealth by virtue of said assessments and valuations.

Defendant says further that the second payment was made with the same notice to the auditor, and that in the receipt given for the said payment their officer recognized the position of defendant in relation to each and both of said payments in this language, to wit:

The railroad commissioners assessed the property of this corporation for $73,726.69. The corporation has paid $57,722.57, which they claim should be in full of all taxes due the State, protesting against the valuation and assessment made by the rail-
19 road commissioners. All the letters which passed between the auditor and defendant, as well as the two receipts of the auditor, are filed herewith and made part hereof, marked Exhibits A, B, C, D, E, F, G.

Par. No. 2. Defendant says there was no assessment made of its taxable property for the year 1882, and it is not and has not been legally bound to pay the Commonwealth one cent on account of the alleged valuations and assessments herein sued on. It says the supposed board of equalization mentioned by the plaintiff has no legal existence, and had none at the time the said valuations and assessments purport to have been made, and had no power or authority either to receive from the auditor the report of this defendant or to correct or equalize the same, or to report its action back to the auditor, because, defendant says, so much of the act of April
20 6th, 1878, entitled "An act to prescribe the mode of ascertaining the value of the property of railroad companies for taxation and for taxing the same," as attempted to confer such powers upon the board of equalization touching the valuation or assessment of railroad property within this State for taxation, is repugnant to and in conflict with the Constitution of the United States, and also with the constitution of this State, and is therefore null and void.

And defendant says the act of April 1st, 1882, attempting to substitute the board of railroad commissioners for the pretended board of equalization, and also the act of April 6th, 1882, therein referred to, by which it was attempted to create the said board of railroad commissioners, are each and both repugnant and in conflict with the constitution of Kentucky, and are each both null and void.

Defendant prays to be dismissed with its costs, and for all proper relief.

IRA JULIAN & WM. LINDSEY,
For Defendant.

21 Attached to the foregoing were the following exhibits:

EXHIBIT "A."

Copy.

Subject, Kentucky Taxes, 1882.

LOUISVILLE & NASHVILLE RAILROAD CO.,
OFFICE OF CHIEF ATTORNEY,
LOUISVILLE, KY., *December 14th*, 1882.

Hon. Fayette Hewitt, Auditor of Public Accounts, Franklin, Ky.

DEAR SIR: The Louisville & Nashville Railroad Company has been advised by its counsel that the assessments and valuations of its property by the board of railroad commissioners for taxation for

the year 1882 are without lawful authority, and are therefore void, and it declines to pay any taxes based upon those assessments and valuations.

But the company does not propose or desire to avoid, or try to avoid, the payment of just and fair taxes on its property; and whilst its own valuations of its property, as returned to your office in 1882, are largely more in proportion to value than the valuations
22 assessed upon the property of individual citizens of the State for State and other taxes, it nevertheless proposes to pay promptly the lawful rate of taxation upon the valuations so returned by it, but with the understanding that the payment is not to be construed as an admission of the validity of the assessments and valuations made by the board of railroad commissioners for taxation for 1882, or of the taxes assumed to be due thereon, and that in any event the sum or sums paid shall be credited to it as taxes paid on its property for this year, and if you conclude to receive the legal rate of taxes upon the valuations of the company's property as returned to you for taxation for 1882, with the understanding and reservation stated, the company will pay as you may call for payment.

Yours truly, RUSSELL HOUSTON,
Chief Att'y L. & N. R. R. Co.

EXHIBIT "B."

Copy.

STATE OF KENTUCKY,
OFFICE OF AUDITOR OF PUBLIC ACCOUNTS,
23 FRANKFORT, *Dec. 15th*, 1882.

Hon. Russell Houston, Chief Attorney L. & N. R. R. Co., Louisville, Ky.

DEAR SIR: Your favor of the 14th inst. is just received. In answer I can only say that whatever your company may remit here will be placed as a credit to the amount of tax assessed against you by the commissioners. If only a portion of that tax should be paid you are of course at liberty to file protest as to the remainder, and a receipt will be given for partial payment. Of course, whenever the company does not pay, prior to the February term of court, the full amount of tax assessed against it, it becomes my duty to bring suit for the remainder, which I shall do. As to the term of payment, I should like very much to have it as soon after the 10th of January as possible.

Yours truly, FAYETTE HEWITT, *Auditor.*

24 EXHIBIT "C."

Copy.

K'y taxes for 1882.

20TH DECEMBER, '82.

Hon. Fayette Hewitt, Auditor, &c., Frankfort, Ky.

DEAR SIR: Press of other matters has prevented an earlier reply

to your favor of the 15th inst., in which you say that "whatever your company may remit here will be placed as a credit to the amount of taxes assessed against you by the commissioners." This would seem to imply an admission upon our part of the validity of the assessments and valuations of the commissioners and of the taxes claimed thereon, when in point of fact we deny their validity. But I propose that whatever we pay shall be credited on account of the State taxes for the year 1882 on the company's property in the State and that you give the company a receipt accordingly, then, in any decission of the question, the State would get that much money on account of the taxes and the company would get a credit
25 for the amount paid, and that is all the State could ask.

I desire to have the company pay, as stated in my former letter, but do not propose to pay except upon condition that it is not to commit us to the validity of the assessments and valuations of the commissioners or of the taxes claimed thereon, or of the validity of any of the remainder of the taxes after crediting the amounts we may pay.

Yours truly, RUSSELL HOUSTON,
Chief Att'y.

EXHIBIT "D."

Copy.

20TH JAN'Y, 1883.

Hon. Fayette Hewitt, Auditor Public Accounts of the State of Kentucky, Frankfort, Ky.

DEAR SIR: The Louisville & Nashville Railroad Company hands you its check No. 16286 on Western Financial Corporation, payable to James W. Tate, State treasurer, or order, for twenty-five thousand dollars ($25,000.00), on account of State taxes for the year 1882 on its property in the State of Kentucky, for which you will
26 please execute, and return a receipt stating that this amount is paid on account of State taxes for the year 1882 on its property in the State of Kentucky.

I am instructed by the company to say that it is willing to pay the legal rate of taxation upon said property upon its valuation thereof for State taxation for the year 1882 which is returned to you as auditor of public accounts of said State, regarding said returns as the only legal valuations and assessments of said property for State taxation for the year 1882, its valuations so returned being in the aggregate ($12,152,078.00) twelve million one hundred and fifty-two thousand and seventy-eight dollars, but that it denies the legal validity of the assessments and valuations of its said property made by the board of railroad commissioners of the State for taxation for 1882 and of the taxes claimed thereon, and protests that it is not bound thereby, and that it makes this payment with the ex-
27 press intention, reservation, and understanding on its part that it shall not be taken or construed as an acquiescence in or an admission of the legal validity of the said assessments and valuations made by the board of railroad commissioners or the taxes

claimed thereon, and that this payment is made with a reservation of all its legal rights in respect of the said assessments and valuations of said commissioners and the taxes claimed thereon.

Yours very truly, A. M. QUARRIER,
Ass't Sec't'y.

EXHIBIT "E."

Copy.

STATE OF KENTUCKY,
OFFICE OF AUDITOR OF PUBLIC ACCOUNTS,
FRANKFORT, *January 22nd*, 1883.

A. M. Quarrier, Ass't Sec't'y Louisville & Nashville Railroad Co.

DEAR SIR: Enclosed I hand you receipt for $25,000 for check remitted us this day in part payment of tax on the above Co. for 1882. The protest accompanying check has been filed with your report. The $25,000 is only about half the tax due according to your own assessment.

28

Yours respectfully, FAYETT HEWITT,
Auditor.

OFFICE AUDITOR PUBLIC ACCOUNTS,
FRANKFORT, KY., *Jan'y 22nd*, 1883.

Received of A. M. Quarrier, ass't sec't'y Louisville & Nashville R. R. Co., the treasurer's receipt for twenty-five thousand $\frac{00}{100}$ dollars, being in part payment of the tax due for 1882 on said corporation. Check, $20,000.

FAYETT HEWITT, *Auditor.*

EXHIBIT "F."

Copy.

27TH JAN'Y, 1883.

Hon. Fayett Hewitt, Auditor of Public Accounts of the State of Kentucky, Frankfort, Ky.

DEAR SIR: On behalf of the Louisville and Nashville Railroad Company, I hand you its check, No. 16,303, on the Western Financial Corporation, payable to James W. Tate, State treasurer, or order, for $32,722.37, on account of State taxes for the year 1882 on its property in the State of Kentucky, for which you

29

will return a receipt such as you returned for $25,000 paid Jan'y 29th, 1883, on same account.

This sum of $32,722.37 with the $25,000 makes the sum of $57,722.37, being the full amount that was due as State taxes at the legal rate on its property for the year 1882 upon its returns and valuations heretofore made to you officially. And the sum now sent you is paid on the same terms and condition and with the same protest and reservation as those upon which the said $25,000 were paid, and the company claims that the said two payments are in full discharge of all lawful taxes due to the State upon its property for the year 1882.

Yours very truly, A. M. QUARRIER,
Ass't Sec'y.

EXHIBIT "G."

Copy.

R. R. Co. OFFICE OF AUDITOR OF PUBLIC ACCOUNTS,
FRANKFORT, KY., *Jan'y 30th*, 1883.

Received of A. M. Quarrier, ass't sec't'y Louisville & Nashville Railroad Company, the treasurer's receipt for thirty-two
30 thousand seven hundred and twenty-two $\frac{37}{100}$ dollars, being on ac. for the tax due for 1882 on said corporation.

Check, $32,722.37.

The railroad commissioners assessed the property of this corporation for $73,726.69. The corporation has paid $57,722.37, which they claim should be in full of all taxes due the State, protesting against the valuation and assessment made by the railroad commission.

FAYETT HEWITT, *Auditor.*

Demurrer to Answer Filed.

At a court held on the 20th day of February, 1883, the attorney general filed a demurrer to defendant's answer.

Demurrer to Answer.

Franklin Circuit Court.

THE COMMONWEALTH OF KY.
vs.
THE LOUISVILLE & NASHVILLE RAILROAD CO.

The plaintiff demurs to the defendant's answer herein, because it does not state facts sufficient to constitute a defense to plaintiff's petition.

P. W. HARDIN,
Att'y Gen'l.

31 *Demurrer to Answer Sustained.*

At a court held on the first day of March, 1883, the matters of law arising on the demurrer to answer being heard, the court sustained the demurrer, and defendant excepts, and leave is given it to amend its answer, which it declined to do.

Judgment.

It is therefore adjudged that the plaintiff recover against the defendant the sum of seventy-three thousand seven hundred and twenty-six and $\frac{67}{100}$ dollars, with interest at 6 per cent. per annum from the 10th day of October, 1882, until paid; also 2% on the amount of principle and interest of this judgement, being for attorney general's fee; also the cost of this proceeding. To be credited by $25,000.00 paid January 22nd, 1883, and $32,722.37 paid 30th of January, 1883.

Appeal Granted.

The defendant excepts to the foregoing judgement and prays an appeal to the court of appeals, which is granted.

On the 8th day of March, 1883, the following assignment of errors and schedule were filed in the clerk's office:

32 *Assignment of Errors and Schedule.*

Franklin Circuit Court.

COMMONWEALTH OF KENTUCKY
vs.
THE LOUISVILLE & NASHVILLE RAILROAD COMPANY.

The defendant comes and assigns for error herein:

1st. The court erred in sustaining the plaintiff's demurrer to the defendant's answer and to each of the paragraphs thereof.

2nd. The court erred in overruling the defendant's demurrer to the plaintiff's petition.

3rd. The court erred in rendering the judgement against the defendant, from which the appeal to the court of appeals has been granted.

IRA JULIAN & WM. LINDSEY,
For Def't.

Schedule.

For the purpose of the appeal in the above-styled case the clerk will copy the entire record.

IRA JULIAN & WM. LINDSEY.

State of Kentucky, Franklin Circuit Court.

33 I, W. Franklin, clerk of the court aforesaid, do certify that the foregoing 20 pages and above lines contain a full, true, and complete transcript of the record and proceedings had in the case therein mentioned, so far as the same is on file in said court.

Witness my hand, this 15th day of March, 1883.

W. FRANKLIN, *C. F. C. C.*

Fee for record, $5.00.

34 *Statement.*

Court of Appeals.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,
vs.
THE COMMONWEALTH OF KENTUCKY, Appellee.

This appeal is to stand on the docket as above set out.

The judgment appealed from will be found on page 20. It was rendered by the Franklin circuit court on the 1st day of March, 1883. The appeal was granted below, and no process is issued.

W. LINDSEY,
For Appellant.

And afterwards, to wit, at a court of appeals continued and held for the Commonwealth of Kentucky, at the capital, in the city of Frankfort, on the 2nd day of October, 1883:

Order.

This day this cause came on to be heard, and was argued
35 by C. Simrall for appellant, and laid over for further argument.

And afterwards, to wit, at a court of appeals continued and held for the Commonwealth of Ky., at the capital, in the city of Frankfort, on the 3rd day of October, 1883:

Order.

This day this cause came on for hearing, and was argued by A. Duvall for appellee, and laid over for further argument.

Afterwards, to wit, at a court of appeals continued and held for the Commonwealth of Ky., at the capital, in the city of Frankfort, on the 4th day of October, 1883:

Order.

This day this cause came on for hearing, and was argued by Holmes Cummins for appellant, and laid over for further argument.

Afterwards, to wit, at a court of appeals continued and held for the Commonwealth of Ky., at the capital, in the city of Frankfort, on the 5th day of October, 1883:

36 *Order.*

This day this cause came on for hearing and was argued by Attorney General Hardin for appellee, and laid over for further argument.

Afterwards, to wit, at a court of appeals continued and held for the Commonwealth of Ky., at the capital, in the city of Frankfort, on the 6th day of October, 1883:

Order.

This day this cause came on for hearing and was argued by Attorney General Hardin for appellee, and laid over for further argument.

Afterwards, to wit, at a court of appeals continued and held for the Commonwealth of Ky., at the capital, in the city of Frankfort, on the 8th day of October, 1883:

Order.

This day this cause came on for hearing and was argued by Wm. Lindsey for appellant, and was submitted to the court.

And afterwards, to wit, at a court of appeals continued and held for the Commonwealth of Kentucky, at the capital, in the

37 city of Frankfort, on the 18th day of December, 1883, the court rendered the following order and judgment:

Order & Judgment.

The court being sufficiently advised, it seems to them that there is no error in the judgment herein.

It is considered that said judgment be affirmed, which is ordered to be certified to said court.

It is further considered that the appellee recover of the appellant its costs herein expended.

The opinion delivered by the court in this cause is as follows, viz:

Opinion.

"The Cincinnati, New Orleans and Texas Pacific, the Chesape-ke, Ohio, and South Western, and the Louisville and Nashville Railway Companies are in this court, as appellants, complaining of a judgment rendered by the Franklin circuit court against them in favor of the State for taxes alleged to be due and unpaid for the year 1882.

38 The proceeding is an ordinary action, authorized by the provisions of the act of April, 1878, entitled "An act to prescribe the mode of ascertaining the value of the property of railroad companies for taxation and for taxing the same." The appellants in their answer below insist that the mode of assessment or valuation of railroad property for taxation, as prescribed by the State, is in direct conflict with the Constitution of the United States and the constitution of this State, and, therefore, the proceeding below should have been dismissed.

In order to a correct understanding between the State and the appellants it is proper to notice the several legislative enactments under which the taxation in this case was imposed, and to review briefly the part legislation of the State with reference to the man-er of assessing the property of such corporations.

By the provisions of the first section of the act of Apr. 3rd, 1878, the president or chief of each railroad company is required,

39 in the month of July in each year, to return to the auditor of public accounts, under oath, the total length of such railroad, &c., with the average value per mile thereof, for the purpose of being operated as a carrier of freight and passengers, including engines, cars, and a list of the depot grounds and improvements and other real estate of the company, and of the value thereof. By the third section the Gove-nor is required to appoint three disinterested freeholders, citizens of the State, who shall constitute a board of equalization, who shall meet annually at the office of the auditor in Frankfort on the first day of September in each year, a majority present constituting a quorum for the transaction of business, and at said meeting the auditor shall lay before them the returns made to him under this act, and should the valuation of any of them in the judgment of the board be either too high or too low, they shall correct and equalize the same by a proper increase or decrease thereof.

It is further provided that their services shall not be for a longer period of time than twenty days in any one year. By section four "the same rate of taxation for State purposes which is or may be in any year levied on other real estate in the Commonwealth shall be, and is hereby, levied upon the value so found by the said board of the railroad, rolling stock, and real estate of each company.

When the valuations are complete notice is given by the auditor to each railroad company of the amount of its assessment for taxation for State purposes, &c., and the taxes are required to be paid on or before the 10th day of October in each year, and upon default made the taxes in behalf of the Commonwealth may be recovered by action in the Franklin circuit court.

The act of April 3rd, 1878, was amended by an act approved April 19th, 1882, by which the board of railroad commissioners appointed under the provisions of an act approved April 6th, 1882, were required "to perform all the powers and duties conferred upon the board of equalization by the act to which this is an amendment." This last enactment substituted the railroad commissioners as the board in room of the freeholders to be appointed by the Governor, whose duty it was by the act of April 3rd, 1878, when the valuations placed on railroad property were too high or too low to correct and equalize the same by a proper increase or decrease thereof.

The act creating the board of railroad commissioners is entitled "An act to prevent extortion and discrimination in the transportation of freight and passengers by railroad corporations, and in aid of that purpose to establish a board of railroad commissioners, and define its powers and duties." The purpose of that act seems to have been to invest the board with a supervisory power over railroad companies, so as to regulate and prevent improper charges for carrying freight and passengers, and to subject such companies upon information made to certain penalties when guilty of extortion.

The provisions of the nineteenth section of this act would conduce to the conclusion that the Legislature intended to confer upon the board judicial power in authorizing them to hear complaints, and render judgments in cases when railroad companies have violated the provisions of the first and second sections of the enactment, but a careful consideration of the act will show an intention to give to the circuit court exclusive jurisdiction to enforce the fines and penalties imposed, and no other jurisdiction is conferred. The award of the board of commissioners, if such power is given by the nineteenth section, is but the basis of a prosecution to be instituted in a tribunal having jurisdiction of the subject-matter.

The commissioners under the act in question constitute a mere advisory board, without any power except to receive reports from railroad companies in the manner prescribed by the act, and to hear complaints and give information when, in their opinion, the railroad companies or any of them have violated the law. They may suggest the mischief, but are powerless to afford a

remedy except by information to some other tribunal. If the power to render an award should exist, we perceive no reason why under the enactment they could not assess the property of the corporations and exercise such ministerial duties as is required of them by the acts of Apr. 3rd, 1878, and its amendments, and the act of April 6th, 1882.

The act of valuation is in its character judicial, but the general duties of this board is ministerial, and for the exercise of such duties the board was organized; and while the law creating it is in many respects imperfect, the court may disregard the 19th section of the act of Apr. 6th, 1882, leaving the board to discharge all the
44 other duties imposed by the act, and thus obviate the objection made by counsel that the act of Apr. 6th, 1882, is in violation of section 2 of article 1 of the State constitution, providing that "No person or collection of persons belonging to one of thes- departments (legislative, executive, and judicial) shall exercise any power properly belonging to either of the others, except in the instance hereinafter expressly permitted."

The appellants in this case, in the year 1882, made returns to the auditor, as required by the provisions of the act of Apr. 3rd, 1878, stating under oath what they regarded as a fair valuation of their roads for the purpose of taxation. The board of commissioners, as is alleged, increased this valuation, and for that reason appellants declined to pay the taxes imposed, and for these taxes the judgment below was obtained.

Two of the appellants paid to the auditor the amount of the taxes due upon the valuations as fixed by the chief officer of each
45 corporation, but the Cincinnati, New Orleans and Pacific Railway Company declined to make any payment, in order, as they now state, that it might be heard upon the constitutional question involved.

It is alleged in the petition by the State that the appellants were present and heard by the board of commissioners upon the question of valuation; nor do we understand that appellants are complaining so much of the valuation placed upon their respective roads as of what they designate the arbitrary power conferred upon the board by the act in question. They maintain that, under the enactment, the hearing before the commissioners was a matter of favor only, and not of right, and this case should be considered as if the valuation had been increased or fixed by the board without the presence of any of the officers of the corporations, and without express notice of the purpose of the board to increase the value of the railroad property, and in this light it is perhaps proper to consider
46 the question that the rights of those parties may be finally determined.

It is maintained by the appellant that the Legislature of the State has no power to provide any mode for taxing railroads which will deprive them of the same remedies that other tax-payers have against arbitrary assessments, or which will make the property of such corporations contribute more than their just and equitable share of the burden of taxation. Before proceeding to the consider-

ation of the principal question involved it will be necessary to notice the present mode of assessment, with the remedies afforded the citizen for decreasing the valuation of his property when the estimate placed upon by the assessor exceeds its value. The right of the citizen to a hearing when his property has been assessed for the purposes of State revenue has been seldom embodied in our system of taxation, and for the greater period of time during the existence of the State government there was no remedy afforded but that
47 of legislative interfere*a*nce, when the only ground of complaint was that his property had been assessed for more than its value. From the year 1873 to the year 1878 no appeal was allowed from the action of the assessor to any tribunals for the purpose of hearing such complaints, and we are not aware of any question made as to the constitutionality of such a revenue law. The doctrine, "that the mode of levying, as well as the right of imposing, taxes is completely and exclusively within the power of the legislature," has always been adhered to by the courts of this State for the palpable reason, as stated by Mr. Justice Cooley in his work "on Constitutional Limitations:" There is no reason for the supposition that, in a matter of this public importance, where promptitude in collection is always desirable and often imperative, dilatory proceedings of this nature (through the forms of process and a jury trial) were within the contemplation of the people when consent-
48 ing to any general provision of the Constitution.

The very existence of the government depends upon this sum-ary mode of collecting its revenue, and the delays occasioned by appeals to the judicial tribunals of the State upon the mere question as to the value of the property, while it might, in some instances, relieve the citizen, would conduce to d*i*stroy the government by taking from it the attribute of sovereignty, without which it cannot exist. As said by the Supreme Court, in the case of Providence Bank *vs.* Billings, reported in 4 Peters: "The interest, wisdom, and justice of the representative body and its relations with its constituents furnish the only security, when there is no express contract, against unjust and excessive taxation, as well as against unwise legislation generally." And in the case of St. Louis *vs.* The Ferry Company, 11 Wallace, the same Court said: "It has been
49 said that the power of taxation for the purposes of the Commonwealth is a part of all governmental sovereignty, and is inseparable from it. It is for the Legislature to decide what persons and property shall be reached by the exercise of this function, and in what proportion and by what process and instrumentalities taxes shall be assessed and collected."

In the case of a State tax imposed on bonds held outside of the State, reported in 15 Wallace, it is further said: "Unless restrained by the opinions of the Federal Constitution, the power of the State as to the mode, form, and extent of taxation, is unlimited, when the subjects to which it applies are within her jurisdiction." And in the case of Kirtland *vs.* Hotchkiss, in 10 Otto, the same general princip*al* is again recognized. The abuse of this power by the State

was never held as sufficient to warrant interference by the Federal judiciary.

While the power as to the mode and amount of taxation is to be exercised alone by the Legislature, "and no attribute of sov-
50 ereignty is more pervading," the legislative department of the Government is not clothed with the power of confiscating the property of the citizen under the guise of taxation. Certain elements, says Mr. Justice Cooley, are essential in all taxation. "It does not necessarily follow because the power is so vast that everything which may be done under pretense of its exercise will leave the citizen without redress, even (if) there be no conflict with any express constitutional inhibition." Absolute arbitrary power over the liberty and property of the citizen exists nowhere in a republic, not even in the largest majority." (Bill of rights, section 2.)

The Legislature has no such power as to discriminate between the citizens by making one or more assume the entir- burden of taxation and exempt the others. Approximate equality in distributing the burden and uniformity in the mode of assessment is the cardinal rule, and as said by this court, in the case of the City of Lex-
51 ington *vs.* McQuillan's Heirs, that while taxation may not be universal, it must be general and uniform. Equality such as is practicable is essential to the constitutionality of taxation, and the only exception is found in cases of local taxation, when the special benefits authorize the imposition of the burden upon those who derive the benefits. From the case of The City of Lexington *vs.* McQuillan's Heirs (9th Dana), decided in the year 1840, and the intermediate cases, including the case of Preston against Roberts, decided at the January term, 1877, this court has held the rule as to uniformity and equality to be fundamental, and gone as far perhaps as the courts of any States in the Union in protecting the citizen against oppression and arbitrary taxation. That there shall be equality as far as reasonably practicable in the distribution of pub-
lic burdens, wheather local or general, is a cardinal principle
52 in the law of taxation, and flagrant departure from that rule ought not to be allowed unless a more equal distribution under the circumstances is unattainable. (Preston *vs.* Roberts, 12 Bush.) Wheather this cardinal rule has been violated we shall now proceed to inquire.

Under the general law for assessing property, real and personal, in the State for taxation the owner is required to list under oath with the assessor, and after this has been done the assessor, upon his own knowledge and other evidence, fixes a full and fair valuation upon the property. (See sections 11, 13, & 16 of article 5, chapter 92, of General Statutes.) By article 6 of same chapter a board of supervisors, consisting of three tax-payers, citizens, is appointed by the county court, with the power to correct any errors committed by the assessor, wheather in fact or in relation to the valuation of the property listed, and when the property has not been correctly val-
ued to fix a proper value on the same. (Section six of article
53 six.) By an act approved April 2nd, 1878, this last act was so amended as to prevent the board from changing the value

of the property as fixed by the assessor without giving notice to the owner, to be served by an officer authorized by law to serve a summons. The party aggrieved may, if the board decides against him, appeal to the county judge, and if over fifty dollars may appeal from the decision of the county judge to the circuit court. The Legislature having seen proper to submit this question of valuation at the instance of the citizen to the court of the State and not leaving it with the revisory board, being merely a question of policy, no necessity exists for enquiring into the expediency of the measure, as in either case after the property has been assessed the increase in valuation is not to be made without a hearing by the parties whose rights are to be affected by the decission of the board.

These appellants, the railroad companies, say that the
54 remedy afforded the citizen under the general law is not only withheld from them, but they are denied the right to a hearing before the tribunal, board of commissioners, whose judgment becomes final as to the question of valuation. The board of railroad commissioners are required to meet an-ually, at the office of the auditor, in Frankfort, on the first day of September in each year, for the purpose of correcting and equalizing the value of the property of these corporations, and the same rate of taxation for State purposes which is or may be in any year levied on other real estate in this Commonwealth shall be levied on the value so found by the board. A railroad must necessarily be regarded as a unit, and, as this court has determined by reason of legislative authority, must be taxed as such. Its rolling stock cannot be seized and subjected for taxes or seized for municipal purposes, nor are the railroads listed by the assessors of the counties through which they may
55 pass for taxation. All of the locomotives, cars, etc., are treated as fixtures, and there is no better or more practical mode of assessing such property than to treat the whole as real estate. The principal object of the Legislature in having the board of commissioners to assess and supervise the taxing of such companies was that no injustice might be done the companies by subjecting their property to fragmentary assessments, subject to the revision of the supervising boards of each county through which the road might run.

Fragmentary taxation of the same line of road by a dozen or more different assessors would scarcely produce that uniformity in assessments so absolutely essential to produce equality in taxation; and the legislative purpose was to obviate such an objection and have a uniform assessment of this class of property, and no wiser suggestion could have been well made than to place the val-
56 uation in the hands of a board of intelligent freeholders, to be selected by the Executive of the State, thus removing the question of value from local influences and prejudices that often result in imposing upon such corporations oppressive burdens. These corporations should contribute their just proportion of the public burden and no more. They have not been taxed on their property in a greater sum than any other owner of real estate, and when enjoying greater rights and privileges in the use of their property

than ordinarily pertains to the individual owner of real estate, they should not complain of the mode of assessment that must in its results produce equality in the distribution of the tax.

While these companies may not have the right to appear before the county board of each county, they have had the valuation of their property fixed by the railroad commissioners and are not even complaining now that the valuation is too high. The class-
57 ification of property in this State for the purposes of taxation has been the subject of much legislation. Corporations, such as banks, insurance companies, express companies, and railroad companies, have been required to list or have their property assessed in a different mode than that prescribed by the general law. Specific taxation is the rule with reference to corporations of one class and a mode different from the general law designated in determining the value of other corporate property. The constitutionality of such legislation is now being questioned. When no discrimination is made to appear and no greater burden imposed on the property of appellants than upon other property of the State, whether belonging to individuals or corporations, when the citizen is permitted to leave the board of supervisors and go, by an appeal, to the circuit court to have his tax decreased, then arises a much more serious constitutional question than is presented in this case. The
58 imposition of taxes is not a judicial function, still, under the statute of this State, the courts of the State are required to *been* complaints as to the valuation of property by the revisory board and to fix the value of the property to be taxed or direct the board from which the appeal emenates to enter the opinion of the court as to the amount for which the citizen should be taxed.

The chancellor and common law judge should hesitate before converting themselves into tax gatherers or assessors, although the ascertainment of value may be in the nature of a judicial finding. It is only a question with the Legislature whether the property of such corporations shall be assessed by the railroad commissioners, whose judgment shall be final, or subject their property to assessment by the county assessors, subject to revision by the county supervisors or the county judge. This question has in effect
59 been decided by the Supreme Court of the United States, in an appeal from the supreme court of Illinois, in an opinion rendered by Mr. Justice Miller in what is known as the "State Railroad Tax Cases," reported in 2 Otto. It was alleged in one of those cases that the value of the railroad track, as returned by the chief officer of the company to the county clerk and auditor, was $648,436.41, and that the State board of equalization had assessed the value of the railroad track at $1,629,556. That the aggregate value of the rolling-stock as returned to the auditor was $338,039, and the aggregate value as fixed by the board of equalization was $1,000,110. It was further alleged that the assessments had been made without notice to the railway company.

The law in regard to the assessment of railroad property in the State of Illinois is very similar to that in existance in this State, the principal difference being that the movable property of such

60 corporations is deemed personalty. The State, county, and city taxes are collected on the assessment made by the board of equalization.

It has larger powers than is confided to the board of railroad commissioners in this State. The tax-payer in the State of Illinois, as in this State, must have notice before his property is increased in its value by the town or county supervisors, while the valuation of the corporate property may be increased by the State board without actual notice. It is true the State board may increase the valuation of the property of any citizen in the same way, but this does not deprive him of the right to notice when the county or township supervisors undertake to increase the value. This action of the county or town supervising board may, and doubtless —, control the action of the board of equalization. The citizen has the benefit of the action of the county boards, and corporations submit
61 alone to the action of the State board, so there is but little, if any, difference in the questions involved in those cases and the one being considered. It is argued, however, that the constitution of the State of Illinois expressly confers upon the General Assembly the power "to tax persons or corporations owning or using franchises and privileges in such manner as it shall from time to time direct by general law, uniform as to the class upon which it operates." This provision of the Illinois constitution, although not found in the constitution of this State, is but the recognition of a power that exists with the Legislature in the absence of a constitutional provision. It is not necessary, or even practical, that the mode of assessing and taxing property shall be uniform, but all property or kinds of property must be taxed equally and at a uniform rate. The mode of assessing the property of a railroad cannot well be similar to the general mode of assessment; and if the
62 mode adopted does not make corporate property contribute more than its just share of the burden, the proceeding is not open to constitutional objection on that ground. One county assessor would have the same right to assess that another would, when the road ran through the county of each, and therefore the necessity of resorting to some other instrumentatity for the purpose of fixing the value. It is further maintained by counsel for the appellants that the denial to these companies of the right to heard, or the absence of an express provision in the act requiring notice to be given of the proceedings of the board, renders the assessment void. This identical question was decided in the tax cases referred to; when the board had increased the assessment or value fixed by the local board, or chief officer of the railroad company, in the absence of any notice required by the act, and upon the allegation that no notice had been given. We are aware that in those cases the ap-
63 pellants were seeking an injunction against the collection of the tax, and the difference existing between that class of cases and those where the State undertakes by an action in a court authorized by statute to enforce payment of tax, a defence would be permitted to be made to the action at law that would not authorize the granting of an injunction by a court of equity. This

rule cannot affect the constitutional question. It is urged that the assessment is in violation of the Federal Constitution, and if so, it was void, and should have been so held by the chancellor. In response to that argument, Mr. Justice Miller, speaking for the court, said: "It is hard to believe that such a proposition can be seriously made, because if void as to the railroad companies, it must be equally void to every other owner of property in the State. If the corporation is entitled to notice, every individual is equally entitled to it. The board had its term of sitting fixed by law,
64 its sessions are not secret. No obstruction exists to the appearance of any one before it to assert a right or redress a wrong." The appellants urge that notice is indispensible, and as said by the learned judge, if so, it must be void as to all. But it is said that the board of commissioners in this State have no supervisory power over any property but that of railroad property, and, therefore, the cases referred to have no application. This can make no difference; if actual notice is required before an assessment can be made or an opportunity to be heard after the assessment has been made, the cases are identical so far as affects the constitutionality of the act. The opinion in the tax cases of the county of Santa Clara and others against various railroad companies, delivered by Mr. Justice Field in the ninth circuit, district of California, has been referred to in support of the position assumed by appellants.
65 We do not understand that such a question was involved in the consideration of those cases. It was held in the opinion of those cases that until the adoption of the Fourteenth Amendment there was no restraint to be found in the Constitution of the United States against the exercise of the taxing powers of the State, but that the first section of the Fourteenth Amendment, declaring that "No State shall make or enforce any law which should abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws," prohibits the imposition of unequal burdens by the State, and, therefore, gives to the Federal judiciary jurisdiction over such questions. Whether or not this is a proper construction of the amendment is a question not before us, and in
66 regard to which we express no opinion. Unjust discrimination in imposing taxation when irregularity is neces-arily produced has never met the approval of this court, but, on the contrary, has always been held to be unconstitutional, but we are not prepared to say that the ordinary mode of assessing property is invalid for want of actual notice to the owner. The assessment is made by the assessor on the oath of the owner and other evidence, and because the owner has no appeal or revisory board to revise the assessment affords no constitutional ojection to the law. Section 12 of the bill of rights provides "that no one can be deprived of his life, liberty, or property unless by the judgment of his peers or the law of the land; the words "law of the land" are equivalent to due process of law, and mean the right to be heard for the preservation and protection of life, liberty, and property; but it was never supposed

that this provision of the bill of rights applied to the ex-
67 ercise of sovereignty by imposing taxes for the preservation and maint*a*inance of the government other than the right of the assessor to value the property upon the oath of the tax-payer and other evidence, as provided by the statute, and if dissatisfied with the valuation, the owner, in the absence of a provision giving him a further hearing, must look to the Legislature for relief, and not to the judicial tribunals of the State. Such has been the uniform construction of the State courts when the term due process of law or its equivalent is found in State constitutions, and attempted to be applied to questions affecting State taxation for revenue purposes. The burden of State taxation is made at last to rest upon the shoulders of those whose incomes, while they furnish a comfortable support, seldom result in adding to the capital invested. They make no complaint, but capital at war with taxation when it affects the income or the State imposes what
68 is conceived to be too onerous a burden, is demanding an appeal either to the revising boards or the judicial tribunals of the State, resulting often in exemption from a just and proper taxation. The hands of the sovereign are tied and the State government on the verge of bankruptcy, while the propriety of the tax is being considered by State and local tribunals "with regard to the precise mode of exercising the taxing power of the Legislature, unless restricted by some constitutional provision, seems to be invested with entire discretion." (Hilliard on Taxation, page 3.) The Supreme Court of the United States, in the case of Kelly *vs.* Pittsburg, reported in 14 Otto, uses the following language: "The main argument of the plaintiff in error, the only one to which we can listen, is that the proceeding in regard to the taxes assessed on his land deprives him of his property without due process of law. It is not asserted that in the method by which the value of his land
69 was ascertained for the purpose of taxation was any departure from the usual mode of assessment. In these respects there is no charge that the methods pursued is not due process of law. Taxes have not as a general rule in this country since its independence nor in England before that time been collected by regular judicial proceedings. The necessities of government, the nature of the duty to be performed, and the customary usages of the people have established a different proceedure, which, in regard to that matter, is and always has been due process of law." In High *vs.* Shoemaker, 22 California, the Court said: "Because universal practice had established at the time our Constitution was adopted that this provision (referring to due process of law) in the Constitution was not understood as applicable to proceedings by the State to obtain from citizens their proper contributions to the expenses of administering the Government."

70 Again, the tax cases reported in 2 Otto, the Court alluding to the Federal statute of 1867, prohibiting a suit in any court for the purpose of restraining the assessment or collection of any tax, says: "And though this was intended to apply alone to taxes levied by the United States, it shows the sense of Congress of the

evils to be feared if courts of justice could in any case interfere with the process of collecting taxes on which the Government depends for its continued existence. It is a wise policy. It is founded on the simple philosophy derived from the experience of ages that the payment of taxes had to be enforced by sum-ary and stringent means against a reluctant and often adverse sentiment, and to do this successfully other instrumentalities and other modes of procedure are necessary than which belong to courts of justice." The mode of assessing and collecting taxes is not in the nature of a judicial proceeding. It is not a judicial inquiry when parties must
71 have notice and the right to be heard.

Revisory boards may be established and appeals allowed by the legislative department of the State, but such modes of relief arise from questions of expediency, but cannot be demanded as constitutional right. When an assessment has been made in the manner prescribed by the statute and tribunals are organized with a view of disturbing that assessment by increasing the value of the property taxed, the party affected by it ought to have an opportunity to be heard, and it is in this class of cases where it is asserted that constitutional right to be heard cannot be denied. But even in a revisory board, with full power to revise the acts of the assessor, it would be impracticable to give such notice as is usual in judicial proceedings before the board can take action. The time and place of meeting having been fixed by law is notice to all, and if the reports of the chief officers of the corporations are to be regarded
72 as an assessment, and the commissioners, as a board of review, the act provides that they shall assemble at the auditor's office in Frankfort, on the first day of September in each year, for the purpose of fixing valuations, and, with that view, are required to examine the reports made by the officers of the roads. This is notice to the companies, and to require actual notice to every one interested, if this board had supervisory power over all property in the State, it would be altogether impracticable; nor will it answer to say that, because there are only a few lines of railroad within the State, actual notice could be readily given, for the court would then be determining the constitutionality of the act by the extent of this supervisory power. As we construe this act, although in the nature of an original assessment, the parties had the right to be heard, and were in fact heard, before the board passing on the question
73 of valuation. If actual notice is necessary, and the right to be heard expressly provided for by statute in such cases, then it is immaterial what may have been embodied in the constitution of the State of Illinois. Those cases fall within the prohibition of the Fourteenth Amendment, if the views of counsel prevail as to its construction. The opinion in the tax cases from that State covers the entire ground, and we are not only disposed to follow it, because it disposes of the constitutional question, but for the reason that it recognizes and establishes a sound and conservative doctrine with reference to State taxation. It is further argued that, as a board, the commissioners have no power to increase the value of such property, and that their duty on this point is confined to the equaliza-

tion of the valuation as reported by the various companies. We do not understand the enactment, but, in our opinion, the prime object was to fix the true value and increase each valuation, or the aggregate value, if in the opinion of the board the value was too
74 low. It is, in fact, an assessing board, and the value fixed by the commissioners must stand. We find no discrimination made against the corporation in favor of the citizen. The same taxes are paid upon the same values and kinds of property, and we perceive no reason for disturbing the judgment below. The same is now affirmed in each case.

I, Thomas J. Henry, clerk of the court of appeals for the Commonwealth of Ky., do certify that the foregoing and annexed 68 pages contains a true and complete transcript of the record therein set forth of The Louisville and Nashville Railroad Company, appellants, against The Commonwealth of K'y, appellee, as is on file in my office.

Witness my hand and seal of said office, at office in city of Frankfort, this 7th day of January, 1884.

[Seal of Kentucky Court of Appeals.]

THOMAS J. HENRY, *C. C. A.*,
By THOMAS G. POORE, *D. C.*

75 COMMONWEALTH OF KENTUCKY, *Jefferson County:*

This is to authorize and empower Wm. Lindsay to sign my name as surety to such bond as may be required to be executed before the Hon. Thos. F. Hargis, chief justice Kentucky court of appeals, in order to perfect the writ of error granted, or about to be granted, by him to the Supreme Court of the United States in the appeal of The Louisville and Nashville Railroad Company *vs.* The Commonwealth of Kentucky, the penalty of said bond not to exceed twenty thousand dollars.

Witness my hand, this 24 day of January, 1884.

F. D. CARLEY.

Signed and acknowledged before me, this the day and date above written.

GEO. H. WEBB,
Cl'k Jeff. Co. C't, Ky.

COMMONWEALTH OF KENTUCKY, *Jefferson County:*

This day appeared before me F. D. Carley, who made oath that he is worth, over and above all his just debts, more than twenty thousand dollars of unencumbered property in the State of Kentucky subject to execution.

Witness my hand, this 24th day of January, 1884.

W. W. MELONE, *D. C.*

76 Supreme Court of the United States.

COMMONWEALTH OF KENTUCKY
versus
THE CHESAPEAKE, OHIO & SOUTHWESTERN RAILROAD COMPANY.

Know all men by these presents that we, The Louisville & Nashville Railroad Company and F. D. Carley, are held and firmly bound unto the Commonwealth of Kentucky in the sum of twenty thousand dollars; for the payment of which, well and truly to be made, we bind ourselves, and each of us, jointly and severally, firmly by these presents. The condition of this obligation is such, that the above-named, The Louisville and Nashville Railroad Company, hath prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the court of appeals of the Commonwealth of Kentucky: Now, therefore, if the above-named Louisville and Nashville Railroad Company shall prosecute its said writ of error to effect, and answer all costs and damages if it shall fail to make good its plea, then this obligation to be void; otherwise, to remain in full force and virtue.

F. D. CARLEY, [SEAL.]
By WM. LINDSAY,
Att'y-in-Fact.

This bond is approved.
THOMAS F. HARGIS,
Chief Justice of Kentucky.

77 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the court of appeals of the State of Kentucky, Greeting

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court of appeals before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit, between The Louisville & Nashville Railroad Company, appellant, and The Commonwealth of Kentucky, appellee, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the
78 Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of said Constitution, treaty, statute or commission, a manifest error hath happened, to the great damage of the said appellant, as by its complaint appears: We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you,

if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the thirteenth day of February, in the year of our Lord one thousand eight hundred and eighty-four.

[Seal of 6th Circuit Court, Ky. Dist., U. S. of America.]

JOSEPH C. FINWELL,
Clerk of the Circuit Court of the United States, Ky. Dist.

Allowed by—
THOMAS F. HARGIS,
Chief Justice of Court of Appeals of Kentucky.

79 United States of America to the Commonwealth of Kentucky, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the 2nd Monday in October next, pursuant to a writ of error filed in the clerk's office of the court of appeals of the Commonwealth of Kentucky, wherein The Louisville and Nashville and Railroad Company is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice done to the parties in that behalf.

Witness the Honorable Thos. F. Hargis, chief justice of the court of appeals of the Commonwealth of Kentucky, this 1st day of Feb., in the year of our Lord one thousand eight hundred and eighty-four.

THOS. F. HARGIS,
Chief Justice.

Citation accepted. Further notice waived and appearance of Commonwealth of Kentucky entered.
Feb'y 2, 1884.

P. W. HARDIN,
Att'y Gen'l.
A. DUVALL,
Att'y for Defendant in Error.

80 *Certificate of Hon. Thos. F. Hargis, Ch'f Justice of C't of Appeals of the Com'lth of Kentucky.*

LOUISVILLE & NASHVILLE RAILROAD COMPANY
vs.
THE COMMONWEALTH OF KENTUCKY.

The Louisville & Nashville Railroad Company having prosecuted

a writ of error to the Supreme Court of the United States to reverse the judgment of the court of appeals of the Commonwealth of Kentucky, rendered December the 18th, 1883, affirming the judgment of the Franklin circuit court of the 1st day of March, 1883, adjudging that the Commonwealth of Kentucky recover of the said Louisville & Nashville Railroad Company the sum of $16,004.34, with costs:

It is now hereby certified that in the record proceedings, and also in the rendition of the judgment of said court of appeals, there was drawn in question the validity of a statute of said Commonwealth of Kentucky, on the ground of its being repugnant to
81 the Constitution of the United States, and the decision was in favor of the validity of the statute.

Given under my hand as chief justice of the court of appeals of the Commonwealth of Kentucky, this 1st day of February, 1884.

THOMAS F. HARGIS,
Chief Justice of Kentucky.

Endorsed on cover: Kentucky court of appeals. No. 498. The Louisville and Nashville Railroad Company, plaintiff in error, *vs.* The Commonwealth of Kentucky. Filed 18th February, 1884.